(1)

Supreme Court, U.S.
FILED

96 585 AUG 19 1996

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term 1996

Steven F. Ethier
Petitioner
v
Kathleen Ann Larson
State of Minnesota
Respondents

On Petition for Writ of Certiorari to the Supreme Court of Minnesota

---

Petition for Writ of Certiorari

Steven F. Ethier
Attorney No 174191
1044 Minnesota Building
46 East Fourth Street
St. Paul MN 55101
(612) 228-0984
Attorney for the Petitioner

43 pp

Issue

Does the freedom of speech and of the press limit the power of a state court to issue and enforce a harassment restraining order?

Table of Contents

Facts 1

Argument 2

I. The Right of Privacy 2

II. State Action 3

III. Domestic Abuse 4

IV. The General Rule of the Right of Expression 8
- A. The State's Motive 8
- B. Necessity for Narrow Exceptions 8
  - 1. Clear and present danger 9
  - 2. Advocacy of Lawless Action 10
  - 3. Fighting Words 10
  - 4. Defamation 10
  - 5. Obscenity and Pornography 11

V. Freedom of Speech: Defense to Harassment Claim 14

VI. The Minnesota Harassment Statute 17

Conclusion 18

Appendix 19
- Opinion of the Minnesota Supreme Court A-1
- Opinion of the Minnesota Court of Appeals A-2
- Restraining Order A-7
- Petition for Harassment Restraining Order A-11
- Amendment I A-14
- Section 609.34 . . . . . A-14
- Section 609.748 . . . . . A-14
- Domestic Abuse Act A-19
- Methods of Coercion A-32
- Greeler v Greeler A-34
- The Cohabitation Trap A-39

Table of Authorities

Cases

Abrams v United States, 250 US 616 (1919) 9, 10
American Booksellers Ass'n v Hudnut, 598 FSupp 1316 (SD Ind 1984), aff'd 771 F2d 323 (7th Cir 1985) 14
Andrews v City of Philadelphia, 895 F2d 1469 (3d Cir 1990) . . . 14
Arlington Heights v Metropolitan Housing Development Corp., 429 US 252 (1977) 8
Arnold v City of Seminole, 614 FSupp 853 (ED Okla 1985) 14
Barnes v Glen Theatre, Inc., 501 US 560 (1991) 16
Berge v Commissioner of Pub. Safety, 374 NW2d 730 (Minn 1985) A-4
Boos v Barry, 485 US 312 (1988) 17
Bougie v Sibley Manor, Inc., 504 NW2d 493 (Minn App 1993) . . 17
Bowers v Hardwick, 106 SCt 2841 (1986) 3
Bowman v Heller, 420 Mass 517, 651 NE2d 369 (1995) 10
Brandenburg v Ohio, 395 US 444 (1969) 10
Broadrick v Oklahoma, 413 US 601 (1973) A-8
Brown v Board of Education, 347 US 483 (1954) 4
Burton v Wilmington Parking Authority, 365 US 715 (1961) 4
California v LaRue, 409 US 109 (1972) 11
Carey v Brown, 447 US 455 (1980) A-5
Carr v Allison Gas Turbine Div. Gen. Motors, 32 F3d 1007 (7th Cir 1994) 14
Chaplinsky v New Hampshire, 315 US 568 (1942) 10
Cincinnati v Discovery Network, Inc., ____ US ____, 113 SCt 1505, 123 LEd2d 99 (1993) 17
Cohen v California, 403 US 15 (1971) 10, 12
Collin v Smith, 447 FSupp 676 (ND Ill 1978), aff'd 578 F2d 1197 (7th Cir 1978), cert denied 439 US 916 (1978) 10
Cornelius v NAACP Legal Defense and Educational Fund, 473 US 788 (1985) 8
DeAngelis v El Paso Municipal Police Officers Association, 51 F3d 591 (5th Cir 1995) 14, 16

Debs v United States, 249 US 211 (1919) 9
Foreman v Anchorage Equal Rights Comm'n, 779 P2d 1199 (Alaska 1989) 3
Forsyth County v Nationalist Movement, ____ US ____, 112 SCt 2395, 120 LEd2d 101 (1992) 17
Frisby v Schultz, 487 US 474 (1988) A-5
Frohwerk v United States, 249 US 204 (1919) 9
Gertz v Robert Welch, Inc., 418 US 323 (1974) 11
Goward v City of Minneapolis, 456 NW2d 460 (Minn App 1990) A-4, A-6
Greeler v Greeler, Dist Ct File No DC 169608 (Hennepin Co Dist Ct, Minn 1994) 4, 5
Harris v Forklift Systems, Inc., ____ US ____, 114 SCt 367, 126 LEd2d 295 (1993) 14, 15
Hustler Magazine v Falwell, 485 US 46 (1988) 11
Hutchinson v Proxmire, 443 US 111 (1979) 11
In re Blilie, 494 NW2d 877 (Minn 1993) A-3
Johnson v County of Los Angeles Fire Department, 865 FSupp 1430 (CD Cal 1994) 16, 17
Jones v Flagship International, 793 F2d 714 (5th Cir 1986) 15
Klink v Ramsey County, 397 NW2d 894 (Minn App 1986) 17
Koppinger v City of Fairmont, 248 NW2d 708 (Minn 1976) 11
Kraft, Inc. v State ex rel Wilson, 284 NW2d 386 (Minn 1979) 3
Le Roy v Sidley, 82 Eng Reprint 1036 (1663) 11
Lewis v City of New Orleans (Lewis I), 408 US 913 (1972) 10
Lewis v City of New Orleans (Lewis II), 415 US 130 (1974) 10
Linmark Associates, Inc. v Township of Willingboro, 431 US 85 (1977) 9
McCulloch v Maryland, 17 US (4 Wheat) 316 (1819) 8
New York Times v Sullivan, 376 US 254 (1964) 3
New York v Ferber, 458 US 747 (1982) 11, A-8
Paris Adult Theatre I v Slaton, 413 US 49, 67 (1973) 12
Pierce v United States, 252 US 239 (1920) 9
R.A.V. v City of St. Paul, ___ US ___, 112 SCt 2538 (1992) . . 16, A-9

Renton v Playtime Theaters, 475 US 41 (1986) 16
Robinson v Jacksonville Shipyards, Inc., 760 FSupp 1486 (MD Fla 1991) 15
Rowan v United States Post Office Dep't, 397 US 728 (1970) 3
Schaefer v United States, 251 US 466 (1920) 9
Schenck v United States, 249 US 47 (1919) 9
Shelley v Kraemer, 334 US 1 (1948) 4
State by Cooper v French, 460 NW2d 2 (Minn 1990) 2, 3
State v Gray, 413 NW2d 107 (Minn 1987) A-8
State v Normandale Properties, Inc., 420 NW2d 259 (Minn 1988) A-9
State v Ray, 292 Minn 104, 193 NW2d 315 (1971) 11
Street v New York, 394 US 576 (1969) 8
Time, Inc. v Firestone, 424 US 448 (1976) 11
Truet v State, 3 Ala App 114, 57 So 512 (1912) 11
Village of Hoffman Estates v Flipside, 455 US 489 (1982) A-9
Village of Schaumburg v Citizens for a Better Environment, 444 US 620 (1980) 8
Waltman v Int'l Paper Co., 875 F2d 468 (5th Cir 1989) 14
Ward v Rock Against Racism, 491 US 781 (1989) A-4
Washington v Davis, 426 US 229 (1976) 8
Welsh v Johnson, 508 NW2d 212 (Minn App 1993) . A-4, A-5, A-6, A-8
West Virginia State Board of Education v Barnette, 319 US 624 (1943) 16
Whitney v California, 274 US 357 (1927) 9
Wisconsin v Mitchell, ____ US ____, 113 SCt 2194, 124 LEd2d 436 (1993) 16
Yauch v State, 109 Ariz. 576, 578, 514 P2d 709, 711 (1973) . . . 11
Yick Wo v Hopkins, 118 US 356 (1886) 8

Constitutions

US Const, Amend I 12, A-6, A-7, A-8, A-14

Statutes and Rules

39 USC § 3008 3
42 USC §§ 2000e-2000e-17 14
609.221-609.224 . . . . . A-17, A-28
Minn R Civ P 24.04 . . . . . A-3, A-7
Minn Stat ch 257 . . . . . A-21
Minn Stat ch 518 . . . . . A-21, A-23
Minn Stat ch 518A A-21
Minn Stat ch 518B A-21
Minn Stat ch 518C A-21
Minn Stat § 257.025 . . . . . A-22
Minn Stat § 363.03 subd 2(a) 2
Minn Stat § 518.13 . . . . . A-20
Minn Stat § 518.17 . . . . . A-22
Minn Stat § 518.175 . . . . . A-22
Minn Stat § 518B.01 . . . . . A-17
Minn Stat § 518B.01 . . . . . A-19
Minn Stat § 563.01 . . . . . A-15
Minn Stat § 609.2242 . . . . . A-28
Minn Stat § 609.34 . . . . . 2, A-14
Minn Stat § 609.342 . . . . . A-19
Minn Stat § 609.343 . . . . . A-19
Minn Stat § 609.344 . . . . . A-19
Minn Stat § 609.345 . . . . . A-19
Minn Stat § 609.5316 subd 3 . . . . . A-30
Minn Stat § 609.713 . . . . . A-17
Minn Stat § 609.713 subd 1 . . . . . A-19
Minn Stat § 609.713 subd 1, 3 . . . . . A-28
Minn Stat § 609.748 . . . 1, 17, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-11, A-14
Minn Stat § 609.748 subd 6 . . . . . A-28

Minn Stat § 609.749 . . . . . A-17, A-28
Minn Stat § 609.749 subd 2 . . . . . A-24
Minn Stat § 645.11 . . . . . A-22
Minn Stat §§ 257.51-257.74 . . . . . A-19

Treatises and Other Sources

Amnesty International, *Report on Torture* (1973) A-33
Browne, Kingsley R., *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 Ohio St LJ 481 (1991) . 15
Fraser, Donald M., *Veto Message of Mayor of Minneapolis*, (January 5, 1984) 14
Jones, Ann, *Next Time She'll Be Dead* (Beacon Press, 1994) . 3, 6, 7, A-33
Molière, *Tartuffe*, Richard Wilbur, trans (Dramatists Play Service, 1989) 2
Schlessinger, Laura, *Ten Stupid Things Women Do to Mess Up Their Lives*, 91-110 (Harper Perennial, 1995) 1
Schlessinger, Laura, *The Cohabitation Trap* 216 Cosmopolitan 92 et seq (March 1994) 1, 3, 17, A-39
Tribe, Laurence, *American Constitutional Law* (Foundation Press, 2d ed 1988) 3, 4, 8, 9, 12
Volokh, Eugene, *Freedom of Speech and Workplace Harassment*, 39 UCLA L Rev 1791 (1992) 15

Facts

Timothy David (Butch) Greeler and Kathleen Ann Larson (actual date of birth: 7-26-44, not 7-26-54 as in her petition and affidavit at page A-11) are unmarried cohabitants at in Minneapolis.

The petitioner, Mr. Greeler and respondent Larson were cab drivers at All City Cab. Because Mr. Greeler with respondent Larson were violating Minn Stat § 609.34 (at page ?), the petitioner sent her a copy of *The Cohabitation Trap* by Dr. Laura Schlessinger, reprinted in *Cosmopolitan,* March 1994, from *Ten Stupid Things Women Do to Mess Up Their Lives,* (at page A-39). Dr. Schlessinger says, "Denial is a big factor in this live-in arrangement. And the styles of denial run from denial of one's own needs to denial of what he is really about."

Respondent Larson filed a petition for a restraining order. The petitioner moved to dismiss respondent Larson's petition, attaching an order finding that Mr. Greeler had abused his ex-wife and minor child. *Greeler v Greeler,* Hennepin County District Court File 169608 (1994) (at page A-34).

Mr. Greeler and respondent Larson left All City Cab. Shortly afterwards, Mr. Greeler drove a Viking Cab at the airport until the Social Security Administration learned that he had been driving cabs while collecting disability benefits.

Mr. Greeler did *not* testify at the hearings. Respondent Larson never defended him.

While the proceedings were pending, John Charles Haggerty, an Airport Cab driver and a reputed enforcer for the Hells Angels weighing more than 300 pounds, personally visited the petitioner at a cab stand in Prior Lake, Minnesota, and verbally threatened him by telling him that Mr. Haggerty belongs to an organization which at times might get violent, and that, if the petitioner receives any further visits, other members of the organization would be the visitors.

Mr. Greeler and Jeffrey J. LaValle, whom All City Cab had fired, later left messages on the petitioner's answering service saying, "We are coming to get you . . . ."

The petitioner raises questions relating to the freedom of speech and press protected by the First Amendment. The trial court's sole holding is that Minn Stat § 609.748 is constitutional. The Minnesota Court of Appeals affirmed, saying that he has no right to express "opinions and propaganda" and that the restraining order "leaves open ample alternative channels for communication."

Argument

Yes, but her son is worse deceived;
His folly must be seen to be believed.
In late troubles, he played an able part
And served his king with wise and loyal heart,
But he's quite lost his senses since he fell
Beneath Tartuffe's infatuating spell.
He calls him brother, and loves him as his life,
Preferring him to mother, child, or wife.
In him and him alone will he confide;
He's made him his confessor and his guide;
He pets and pampers him with love more tender
Than any pretty mistress could engender,
Gives him the place of honor when they dine,
Delights to see him gorging like a swine,
Stuffs him with dainties till his guts distend,
And when he belches, cries "God bless you, friend!"
In short, he's mad; he worships him; he dotes;
His deeds he marvels at, his words he quotes,
Thinking each act a miracle, each word
Oracular as those that Moses heard.
Tartuffe, much pleased to find so easy a victim,
Has in a hundred ways beguiled and tricked him,
Milked him of money, and with his permission
Established here a sort of Inquisition.

Molière, *Tartuffe*, Act I Scene 2, Richard Wilbur, trans (Dramatists Play Service, Inc., 1989)

I. The Right of Privacy

Minnesota prohibits fornication. Minn Stat § 609.34.

The Minnesota Supreme Court refused to enforce the provisions prohibiting marital status discrimination in the Minnesota Human Rights Act, Minn Stat § 363.03 subd 2(a), against a landlord whose religious "beliefs include that an unmarried couple living together or having sexual relations outside of marriage is sinful." *State by Cooper v French*, 460 NW2d 2, 3-4 (Minn 1990).

> This court, . . ., has consistently looked to the legislature's policy of discouraging the practice of fornication and protecting the institution of marriage. *Kraft, Inc. v State ex rel Wilson*, 284 NW2d 386, 388 (Minn 1979) (8-0 decision).

French, 460 NW2d 2 at 5 (Minn 1990). The court pointed out that Alaska's fornication statute had been repealed 11 years earlier in concluding that protection for unmarried, cohabiting couples was included. *Foreman v Anchorage Equal Rights Comm'n*, 779 P2d [1199] at 1201-1202 [(Alaska 1989)]. At the very least, before the state imposes sanctions on French, it must repeal the fornication statute.

Id at 7.

> It is simply astonishing to me that the argument is made that the legislature intended to protect fornication and promote a lifestyle which corrodes the institutions which have sustained our civilization, namely marriage and family life. If the legislature intended to protect cohabiting couples and other types of domestic partners, it would have said so.

Id at 8.

The state may regulate sex. *Bowers v Hardwick*, 106 SCt 2841 (1986). See also Laurence Tribe's diatribe against *Hardwick*:

> Unfortunately, the reality of the Court's privacy jurisprudence does not always parallel the caliber of its rhetoric. . . . [T]he Court found that there was no intimate association worthy of the Constitution's special protection.

Laurence Tribe, *American Constitutional Law* § 15-21 (Foundation Press, 2d ed 1988).

Rowan v United States Post Office Dep't, 397 US 728 (1970) sustains the statutory procedure in 39 USC § 3008 that Mr. Greeler and respondent Larson have not used to exclude *The Cohabitation Trap* from respondent Larson's home.

II. State Action

Timothy David (Butch) Greeler, the real party in interest, intends to isolate respondent Larson (see "Methods of Coercion" from Ann Jones, *Next Time She'll Be Dead* 90-91 (Beacon Press, 1994) (at page A-31) and censor any negative statement about his conduct. When he persuaded her to file her petition, he enlisted the court to assist him. The United States Supreme Court has refused to allow a court to enforce a law that violates anyone's civil rights. *New York Times v Sullivan*, 376 US 254 (1964)

(striking down a state rule that publishers of defamatory falsehoods are strictly liable in tort); *Shelley v Kraemer*, 334 US 1 (1948) (refusing to enforce a state rule against racially restrictive covennants); *Burton v Wilmington Parking Authority*, 365 US 715 (1961) (prohibiting a restaurant leased from a state from refusing service on the basis of race).

> The difference between these last cases and the school segregation case [*Brown v Board of Education*, 347 US 483 (1954)] is plain. In these cases, it is not so much the basic government action to which the litigants object: no one contended in these cases that government should not protect and regulate monopolies, punish trespassers, or permit creditors to protect their interests. Rather, the litigants, objecting to the acts of private parties, sought to portray as support or tacit approval what might be characterized as mere governmental acquiescence in certain acts, in order to obtain federal judicial assistance in discouraging the objectionable private activity. In deciding whether the litigants would indeed obtain that judicial assistance, the Supreme Court had to determine whether government inaction, acquiescence, or tolerance could fairly be judged to be tacit ratification of a challenged private choice or, perhaps, delegation of a public responsibility to a private party; if so, whether all such governmental silence or acceptance was itself a form of "state action"; and if not, whether any criteria exist for distinguishing varieties of inaction [lengthy footnote omitted].

Laurence Tribe, *American Constitutional Law*, § 18-1 at 1689 (Foundation Press, 2d ed 1988).

III. Domestic Abuse

Mr. Greeler's history of domestic abuse is well documented in *Greeler v Greeler*, Dist Ct File No DC 169608 (Hennepin Co Dist Ct, Minn 1994) (at page A-34). The district court had found:

> 7. That . . . [Mr. Greeler] had made statements to [his daughter] regarding burning down the house, leaving skeletons in the house and leaving with [his daughter].
>
> . . . .
>
> 9. That [Mr. Greeler] in open court admitted making the statements but could not believe that the minor child was frightened blaming any fear on [his ex-wife]. During his testimony, [Mr. Greeler] indicated that thoughts had come into

his head and he had spoken out loud and the child had overheard him.

. . . .

10. That . . . [Mr. Greeler] had appeared at school with a gun holster on for school conferences although [he] did not display a gun. [He] has threatened to come to the school when requested not to do so by the principal.

Id.

No one has dealt with the problems the real abuser causes. Ann Jones, a journalist, activist, and critic, says, in general:

> The battered women's movement arose among women from immediate need, not abstract theory. It was taken up by concerned policy makers largely for reasons of politics and economics, not justice. So we have a situation in which social action *precedes* the premise from which it should follow: namely, that all women have an absolute right to be free from bodily harm. It is no longer enough to offer some victimized women safety and sympathy, any more than it would have been enough to offer Rosa Parks that seat at the front of the bus without granting the principle of social equality behind it. Grant the principle and all the rest falls into place. For women in the United States, that principle has not yet been recognized.
>
> So it happens that while we profess to believe it wrong for men to beat women, we tend to make allowances in individual cases for men who do, finding in these cases particular circumstances which suggest that the woman is really to blame. Popular discourse derived largely from Freudian psychology and macho tradition fills our minds with prefabricated phrases, exonerating the abuser and blaming the victim. We understand that he was under "stress" of one sort or another, while she was emasculating, cold, provocative, self-destructive, hysterical, masochistic, and free to leave. . . .
>
> Knowing public attitudes, abused women often keep silent out of shame and a fear of being blamed, thereby appearing to acquiesce to violence. But if the abused woman appears complicitous, so do we; making excuses for the abuser in this case, blaming the victim in that case, we *approve* violence. Is it any wonder that battering continues?
>
> Our thinking about battered women is hindered by some pernicious habits of mind. First, there is the popular conviction

that if abused women seek help from the law, they get it, when in fact the law itself *contributes* to the abuse they undergo. Second, our general ignorance of the real nature and seriousness of battering. Third, the commingling in the popular imagination of sex, anger, aggression, and violence. And finally, and perhaps most important, the persistent tendency to blame victims for "their" problems. . . .

Ann Jones, *Next Time She'll Be Dead,* 13-16 (Beacon Press, 1994). Ann Jones explains the origins of the term "domestic Violence":

> "Domestic violence" is one of those gray phrases, beloved of bureaucracy, designed to give people a way of talking about a topic without seeing what's really going on. [Footnote omitted] Like "repatriation" or "ethnic cleansing," it's a euphemistic abstraction that keeps us at a dispassionate distance, far removed from the repugnant spectacle of human beings in pain. We used to speak of "wife beating"—words that brought to mind a picture of terrifying action, a big, heavy-handed man with a malicious eye, and a slight woman, dazed and bent, raising her arms against the blows, and crying out, "No!" Or we called it "wife torture," the words of Frances Power Cobbe that conjure scenes *between* beatings; the sullen husband, withdrawn and sulking, or angry and intimidating, dumping dinner on the floor, throwing the cat against the wall, screaming, twisting a child's arm, needling, nagging, manipulating, criticizing the [woman] who never does anything right, who's ugly and stupid, who should keep her mouth shut, who should spread her legs now, who should be dead, who will be if she's not careful. Dickens drew such scenes, and Hardy and D. H. Lawrence, Dostoevsky and Zola, Doris Lessing, Toni Morrison, Margaret Atwood, Alice Munro, Alice Walker, Joyce Carol Oates. But we prefer to speak of "domestic violence."

Ann Jones, *op cit* at 81. She continues:

> . . . . "Emerge," a Boston counseling program for men who batter, uses this working definition: violence is "any act that causes the victim to do something she does not want to do, prevents her from doing something she wants to do, or causes her to be afraid." And they note that "violence *need not involve physical contact with the victim,* since intimidating acts like punching walls, verbal threats, and psychological abuse can achieve the same results." Psychological abuse, which they

define as "behavior that directly undermines . . . self-determination or self-esteem," becomes "particularly powerful" when mixed with physical violence. Behavior you might not think of as "violence," behavior you might think of merely as getting things off your chest—such as "yelling, swearing, sulking, and angry accusations"—*is* violences if it coerces or frightens another person. And the likelihood of its doing just that increases exponentially when it's "'reinforced' by periodic or even occasional {physical} violence." [Footnote omitted].

It's vital to understand that battering is *not* a series of isolated blow-ups. It is a *process of deliberate intimidation intended to coerce the victim to do the will of the victimizer*. The batterer is not just losing his temper, not just suffering from stress, not just manifesting "insecurity" or a spontaneous reaction "provoked" by something the victim did or (as psychologists put it) "a deficit of interpersonal skills" or an "inhibition in anger control mechanisms." . . . . "I wasn't myself." "I was drunk." "I went bananas." "I lost it." "I went out of my mind." It's lines like these that provide a public excuse and deceive a battered woman into giving one more chance to the so-called *real,* nonviolent man underneath. But in fact that violence *is* himself, perfectly *in* control and *exercising* control.

. . . . No, the violent man is not out of control. He is a man at work on his own agenda, which is to train "his" woman to be what he wants her to be, and only what he wants her to be, all the time.

Those control skills have been well documented, and they resemble nothing so much as the tactics used by Nazi guards to control prisoners in the death camps, and by Chinese thought-reformers to brainwash American P.O.W.'s in Korea. Psychologist Alfred D. Biderman studied brainwashed American soldiers, and his work, augmented by strikingly similar accounts of political prisoners, hostages, and concentration camp survivors, was codified in a "chart of coercion" published by Amnesty International in 1973. That chart is often reproduced and handed out in support groups at shelters, and battered women come up with endless examples of the general methods in action.

Id at 88-92. The chart is reproduced at page A-31 showing comments of shelter support group members. The Minnesota Domestic Abuse Act is at page A-19.

IV. The General Rule of the Right of Expression

The state has the burden of showing that its regulation of expression is a narrow categorical exception or that the regulation is necessary to further a compelling state interest. Laurence H. Tribe, *American Constitutional Law* 832-33 (Foundation Press, 2d ed 1988).

A. The State's Motive

The state should not avoid the free speech guarantee of the first amendment by any guise. *McCulloch v Maryland*, 17 US (4 Wheat) 316, 423 (1819) (dictum) (Marshall, CJ): "[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government . . . such an [enactment would not be] the law of the land."

The trial court should determine whether a state official had an improper motive to suppress particular speakers or messages in ordering the exclusion of advocacy organizations from a charity fundraising drive. *Cornelius v NAACP Legal Defense and Educational Fund*, 473 US 788, 813 (1985). The improper motive need not be the sole motive to justify invalidation.

> *Washington v Davis*, [426 US 229 (1976)] does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern. . . . When there is proof that a racially discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Arlington Heights v Metropolitan Housing Development Corp., 429 US 252, 265-66 (1977). See *Yick Wo v Hopkins*, 118 US 356 (1886).

B. Necessity for Narrow Exceptions

The state must narrowly draft a regulation of expression. *Village of Schaumburg v Citizens for a Better Environment*, 444 US 620 (1980), struck down an overbroad ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations that did not use at least 75 per cent of their receipts for charitable purposes as an "only peripherally promoted" interest that "could be served by measures less destructive of First Amendment interests." *Street v New York*, 394 US 576 (1969), reversed a conviction for words contemptuous of the flag.

"Whenever the harm feared could be averted by a further exchange of ideas, governmental suppression is conclusively deemed unnecessary." Tribe, *American Constitutional Law* 833-34. See also *Whitney v California*, 274 US 357 (1927) (Brandeis, J): "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." In *Linmark Associates, Inc. v Township of Willingboro*, 431 US 85 (1977), Justice Thurgood Marshall struck down an ordinance prohibiting "For Sale" signs on houses to forestall "white flight," and he suggested that residents post "Not For Sale" signs.

1. Clear and present danger

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Schenck v United States, 249 US 47 (1919). See *Frohwerk v United States*, 249 US 204 (1919), and *Debs v United States*, 249 US 211 (1919). Later, Justices Holmes and Brandeis dissented in support of the right of free speech in *Abrams v United States*, 250 US 616 (1919); *Schaefer v United States*, 251 US 466 (1920); and *Pierce v United States*, 252 US 239 (1920). As Justice Holmes said:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly with the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth

> is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."

Abrams v United States, 250 US 616 (1919).

2. Advocacy of Lawless Action

The state must limit its prohibition of advocating criminal syndicalism to advocacy (1) "directed to inciting or producing imminent lawless action" and (2) "likely to incite or produce such action." *Brandenburg v Ohio,* 395 US 444 (1969).

3. Fighting Words

In *Chaplinsky v New Hampshire,* 315 US 568 (1942), a Jehovah's Witness called a city marshal a "damned Fascist" and a "God damned racketeer" The Court sustained his conviction as the utterance of "fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." However, in 1971, the Court found that the words on Mr. Cohen's jacket could not be prohibited as fighting words.

> [W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others, it is nevertheless true that one man's vulgarity is another man's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Cohen v California, 403 US 15 (1971). The state may not prohibit "obscene or opprobrious language toward . . . any member of the city police." *Lewis v City of New Orleans (Lewis I),* 408 US 913 (1972); *Lewis v City of New Orleans (Lewis II),* 415 US 130 (1974).

The Ku Klux Klan was allowed to march in Skokie, Illinois, the home of many survivors of the Holocaust. *Collin v Smith,* 447 FSupp 676 (ND Ill 1978), aff'd 578 F2d 1197 (7th Cir 1978), cert denied 439 US 916 (1978).

4. Defamation

In *Bowman v Heller,* 420 Mass 517, 651 NE2d 369 (1995), the defendant superimposed a photograph of the plaintiff's face on pornographic photographs of other women to make the plaintiff "look ridiculous," and circulated the altered photographs to five co-workers. The plaintiff was a candidate for president of the local union, but the

defendant denied that he intended to influence the election. The court found that the plaintiff was not a public figure like Rev. Jerry Falwell. *Hustler Magazine v Falwell,* 485 US 46 (1988). See *Gertz v Robert Welch, Inc.,* 418 US 323 (1974); *Time, Inc. v Firestone,* 424 US 448 (1976); and *Hutchinson v Proxmire,* 443 US 111 (1979).

5. Obscenity and Pornography

The Minnesota Supreme Court struck down a municipal ordinance banning nude dancing in Fairmont:

> Plaintiff's central attack on the Fairmont ordinance is based on alleged overbroad intrusion by the ordinance into freedom of expression. [footnote omitted]. The thrust of that attack is that nudity may be an integral part of protected forms of expression, e.g., dance performances, theatrical performances, etc. Therefore, plaintiff argues, an ordinance may not sweep broadly over these protected forms of expression under the guise of prohibiting certain conduct or forms of expression which might not be protected.
>
> The response to plaintiff's argument is that nudity is not protected expression, but conduct, which the city has a substantial interest in regulating via its police power. See *State v Ray,* 292 Minn 104, 193 NW2d 315 (1971). Nudity was a traditional common-law crime, an act malum in se. *Le Roy v Sidley,* 82 Eng Reprint 1036 (1663); *Truet v State,* 3 Ala App 114, 57 So 512 (1912). The state has a valid interest in prohibiting public nudity. As the Arizona Supreme Court put it:
>
> > " . . . The evil sought to be suppressed is not only the infliction of nudity upon a beholder's moral sensibilities, but also the public degradation and debasement of the individual exposed." *Yauch v State,* 109 Ariz. 576, 578, 514 P2d 709, 711 (1973).
>
> In addition to these moral interests, the city may have further valid interests in preventing public commercial exploitation of sex and acts of rape, prostitution, and other disruptive and disorderly conduct attendant thereto. see *California v LaRue,* 409 US 109 (1972).

Koppinger v City of Fairmont, 248 NW2d 708, 710-11 (Minn 1976).

> *[New York v] Ferber,* [458 US 747 (1982)] seems to signal a heightened sensitivity on the Court's part to the harms that pornographic activity can inflict upon *participants* in obscene

productions as well as viewers of the resulting materials. Previous opinions, as well as scholarly analyses, had tended to focus almost exclusively on the impact upon the reader or viewer of the obscene. [footnote omitted]. The difference between protecting children as viewers and children as participants is that between a child labor law as enforced in a newspaper shop——which is concerned not with what the paper says, but with the conditions under which children might be harnessed in its production—and a law that suppresses the newspaper because of what it says and the impact it might have on the reader.

In spite of this receptiveness to the regulation of obscenity and child pornography, the Court has insisted that "thematic obscenity" is fully protected as a form of speech, so that a state cannot, for example, ban distribution of a film on the ground that it advocates adultery or makes fornication seem like fun. [footnote omitted]. On this basis the Court has maintained that the regime it is permitting "is distinct from a control of reason and the intellect." *Paris Adult Theatre I v Slaton,* 413 US 49, 67 (1973). It may be that hardcore pornography has little ideological content—although hedonism is surely an idea—but the first amendment has not generally been confined to the protection of high-minded discussion among savants, and in *Cohen v California,* [403 US 15 (1971),] the Court reversed a conviction for wearing a jacket inscribed with the words "Fuck the Draft," reasoning that the Constitution protects the "emotive function" of communication no less than its "cognitive content." [footnote omitted]. That obscenity or pornography appeals to viewers at a subconcious level and elicits a response more visceral than cerebral hardly distinguishes it from a great deal of the most effective advertising or, for that matter, political rhetoric.

Laurence H. Tribe, *American Constitutional Law* 915-16 (Foundation Press, 2d ed 1988)

On January 4, 1984, Mayor Donald M. Fraser of Minneapolis vetoed an ordinance prohibiting pornography, which Catharine MacKinnon and Andrea Dworkin advocated to protect the civil rights of women:

During the last week, people all over America have heard the voices of women in Minneapolis who deplore the pervasive images of women in subordinate roles which continue to define women as second-class citizens. By authoring and supporting an amendment to our municipal law which would identify pornogra-

phy as a violation of the civil rights of women, feminist leaders in Minneapolis have attacked one aspect of the American culture which appears to covertly sanction violence against women.

The thoughtful discussion this proposed ordinance has evoked has been healthy for our community. The proponents have contributed new concepts through their skillful analysis of an issue rarely discussed in the public policy arena. They have brought the issue of pornography and its effects on women to national, if not international, attention. I applaud their leadership for social change. As the Mayor of Minneapolis responsible for the governance of this community, however, I must veto the Civil Rights ordinance which was passed by the City Council last Friday.

The remedy sought through the ordinance as drafted is neither appropriate nor enforceable within our cherished tradition and constitutionally protected right of free speech. The definition of pornography in the ordinance is so broad and so vague as to make it impossible for a bookseller, movie theater operator or museum director to adjust his or her conduct in order to keep from running afoul of its proscriptions. The ordinance needs more analysis and redrafting before a final judgement can be made as to whether or not it would then represent sound public policy and should be adopted.

. . . .

To the extent that this ordinance would bar obscene material it is redundant, because obscene material is now prohibited by law. The ordinance is broader, though. It seeks to ban material that is not obscene under existing law. The ban would apply to material that meets two requirements: it must be a) sexually explicit and b) degrading to women. But sexually explicit material that is not obscene is protected by the First Amendment. Also protected is the expression of abhorrent or detestable ideas such as the claim that women are mere sex objects or otherwise to be thought of in degrading terms.

. . . .

As drafted, the ordinance is too broad and vague to give notice as to what non-obscene material would be prohibited. This is particularly important because the ordinance expressly precludes any defense that the defendant did not know or intend the material to be pornographic or discriminatory against

women. The chilling effect of an overly broad ordinance is well known.

Donald M. Fraser, *Veto Message of Mayor of Minneapolis,* (January 5, 1984). The City of Indianapolis, Indiana, enacted the MacKinnon-Dworkin ordinance, and the federal courts struck it down. *American Booksellers Ass'n v Hudnut,* 598 FSupp 1316 (SD Ind 1984), aff'd 771 F2d 323 (7th Cir 1985).

V. Freedom of Speech: Defense to Harassment Claim

On May 10, 1995, Judge Edith H. Jones for the Fifth Circuit, decided a Title VII harassment claim against a female police officer:

> The principal issue in this case is whether a jury verdict for the plaintiff in a Title VII sexual harassment case may be supported only by evidence of a few written jibes, at women police officers generally and the plaintiff in particular, published in the police association newsletter. We hold that such evidence, rife as it is with first amendment overtones, will not suffice and so reverse the judgment.

DeAngelis v El Paso Municipal Police Officers Association, 51 F3d 591, 592 (5th Cir 1995). The court summarized the evidence, explained its weaknesses, and continued:

> Further, judged by the "totality of the circumstances" set out in *Harris [v Forklift Systems, Inc.,* ____ US ____, 114 SCt 367, 126 LEd2d 295 (1993)], this case is hardly as compelling as many reported Title VII sexually hostile environment claims. First, DeAngelis was subjected to no overtly discriminatory professional treatment. She was not a victim of ridicule before her promotion to become the first woman sergeant in the police department. see *Harris,* ____ US at ____, 114 SCt at 319; *Andrews v City of Philadelphia,* 895 F2d 1469, 1486 (3d Cir 1990) (derogatory and sexual remarks and conduct against female police officer). Second, no physical or sexual advances were made on DeAngelis, as has been characteristic of many hostile environment claims. See, e.g., *Waltman v Int'l Paper Co.,* 875 F2d 468 (5th Cir 1989) (female employee was repeatedly sexually groped and propositioned); *Carr v Allison Gas Turbine Div. Gen. Motors,* 32 F3d 1007 (7th Cir 1994) (co-workers of female tinsmith cut her overalls and accompanied exposure of themselves with lewd sexual innuendos); *Arnold v City of Seminole,* 614 FSupp 853 (ED Okla 1985) (female police officer

subjected to lewd and vulgar sexual comments and innuendos, and discriminatory employment action). Third, DeAngelis was not preyed upon by a superior whose actions could be interpreted as an abuse of power against a subordinate employee. *Harris*, ____ US at ____, 114 SCt at 369; *Jones v Flagship International*, 793 F2d 714 (5th Cir 1986) cert denied, 479 US 1065 (1987). She was herself in a command position. Fourth, apart from the claimed impact of the articles, there is no evidence of an atmosphere of sexual inequality or sexually demeaning treatment within the El Paso Police Department, her employer. On the contrary, representatives of the police department testified that they were embarrassed about and exhorted against the R.U. Withmi columns. Chief Scagno twice distributed memoranda throughout the police department condemning the R.U. Withmi columns. [footnote 5 omitted].

Because we have concluded that insufficient evidence supports DeAngelis' claim of a sexually harassing work environment, we do not reach the difficult question whether Title VII may be violated by expressions of opinion published in the R.U. Withmi columns in the Association's newsletter. Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.[1] See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L Rev 1791 (1992); Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 Ohio St LJ 481 (1991). Whether such application of Title VII are necessarily unconstitutional has not yet been fully explored. But see *Robinson v Jacksonville Shipyards, Inc.*, 760 FSupp 1486 (MD Fla 1991). The Supreme Court's offhand pronouncements are unilluminating.[2]

---

1. [6] We do not mean that sexual propositions, *quid pro quo* overtures, discriminatory employment actions against women or "fighting words" involve the First Amendment.

2. [7] The Court's pronouncement in *R.A.V.*, that "sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices" does not mean that Title VII

DeAngelis, 51 F3d 591, 596-97 (5th Cir 1995).

The United States District Court for the Central District of California held that the defendant fire department's sexual harassment policy violated the plaintiff's first amendment right to read *Playboy* in the fire station. *Johnson v County of Los Angeles Fire Department*, 865 FSupp 1430 (CD Cal 1994).

The court found that the regulation was based on content and poses "a particularly onerous restriction on First Amendment rights because they threaten the free marketplace of ideas." The court quoted *West Virginia State Board of Education v Barnette*, 319 US 624, 642 (1943):

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.
>
> * * *
>
> Defendants [in *Johnson v County of Los Angeles Fire Department*] offer two arguments to support the proposition that the prohibition is not, in fact, content-based. First, defendants argue that the policy only prohibits nude pictures, and nudity is not speech. See *Barnes v Glen Theatre, Inc.*, 501 US 560 (1991). This argument is spurious. [The regulation] does not by its terms apply to nude pictures, it applies to magazines which are "sexually oriented." Pictures of nude women which are not contained in sexually oriented magazines would not be covered by [the regulation]; similarly, sexually oriented magazines which contain no nudity are banned by [the regulation].
>
> The second argument proffered by defendants is that [the regulation] does not regulate the content of the magazines but rather the "secondary effects." *Renton v Playtime Theaters*, 475 US 41 (1986) (finding that regulation of adult theaters which was designed to prevent the decay of neighborhoods was content-

---

trumps the First Amendment speech rights. Rather, as the next sentence in *R.A.V.* explains, conduct not targeted on the basis of its expressive content may be regulated. *R.A.V. v City of St. Paul, Minnesota*, ____ *US* ____, ____, *112 SCt 2538, 2546-47, 120 LEd2d 305 (1992)*. Citing *R.A.V.*, the Court in *Wisconsin v Mitchell*, ____ US ____, ____, 113 SCt 2194, 2200, 124 LEd2d 436 (1993) reiterated that conduct not targeted on the basis of its expressive content may be regulated by Title VII. However, application of Title VII to the "conduct" in the case *sub judice* would do precisely that—regulate speech on the basis of its expressive content.

neutral). This argument is equally unavailing. It is undisputed that [the regulation] is concerned with the communicative or emotive impact of the "sexually oriented" magazines. [footnote omitted]. Such communicative or emotive impact may be sexual arousal on the part of the male reader or offense on the part of an unwitting female viewer. The Supreme Court has consistently held that a government body cannot rely on the doctrine of "secondary effects" when the regulation is concerned with the emotive impact of the speech. See *Boos v Barry*, 485 US 312 (1988) (regulation prohibiting placement of signs near foreign embassies which would offend the foreign governments is content-based); *Cincinnati v Discovery Network, Inc.*, ____ US ____, 113 SCt 1505, 123 LEd2d 99 (1993) (regulation permitting distribution of newspapers but not commercial handbills is content-based); *Forsyth County v Nationalist Movement*, ____ US ____, 112 SCt 2395, 120 LEd2d 101 (1992) (city ordinances which charge fees for demonstrations based upon potential hostile response of public is content-based).

In short, [the regulation] is undoubtedly a content-based regulation. As such, the interference with plaintiff's First Amendment rights is particularly weighty.

Johnson v County of Los Angeles Fire Department, 865 FSupp 1430 (DC Cal 1994). See also *Bougie v Sibley Manor, Inc.*, 504 NW2d 493 (Minn App 1993) (facts include affair between plaintiff and one of the defendants with kissing, touching, other offers); *Klink v Ramsey County*, 397 NW2d 894 (Minn App 1986) (language, *Playboy*, "girly" magazines, no known touching).

VI. The Minnesota Harassment Statute

The Minnesota statute includes "acts, *words, or gestures*" in its definition. Minn Stat 609.748, subd 1(a)(1) (1994). The appellant mailed a copy of Laura Schlessinger, *The Cohabitation Trap*, 216 Cosmopolitan 92 (March 1994). This article does not come under any exception to the right of expression under the First Amendment.

Conclusion

The petitioner asks the Court to dissolve the restraining order, which abridges the freedom of speech and of the press protected by the First Amendment.

Respectfully Submitted,

Steven F. Ethier
Attorney No 174191
1044 Minnesota Building
46 East Fourth Street
St. Paul MN 55101
(612) 228-0984

Attorney for Petitioner, Steven F. Ethier